

Employment and Staffing

Uniformed Services Employment and Reemployment Rights Act (USERRA) PL 103-353

Summary of Changes. This regulation replaces the earlier version, dated 18 August 2008. It changes paragraph 11(a)(1) from “Use accrued and accumulated annual leave” to “Use accrued and accumulated annual leave prior to and during LWOP-US; but not during Separation-US. Technicians electing Separation-US will receive lump-sum payment for any unused annual leave;” changes 11(a)(1) from “Have their annual leave remain to their credit until they return to their technician position” to “Have their annual leave remain to their credit until they return to their technician position from LWOP-US, but not Separation-US;” and changes 11(c) from “Sick leave may not be used while on military duty and will be recredited to the technician upon return to technician position” to “Sick leave can be used while on military duty (LWOP-US) IAW the statutory and regulatory criteria for using sick leave. Otherwise, sick leave will be recredited to the technician upon return to technician position.” Additionally includes Chapter 63 for Title 5 USC and Part 630 for Title 5 CFR under paragraph 2, References.

Applicability. California National Guard Full-time Personnel Regulation (CNGFPR) applies to all California Army and California Air National Guard technicians and to commanders, managers and supervisors (military or civilian) with authority or responsibility over technician personnel management.

Proponent and Exception Authority. The proponent of this regulation is the Joint Force Headquarters, J-1, Directorate for Human Resources. The proponent has authority to approve exceptions to this regulation when they are consistent with controlling laws and regulation.

Supplementation. Supplementation of this regulation is prohibited.

Suggested Improvements. Users of this regulation are invited to send comments and suggested improvements to Joint Force Headquarters, Directorate for Human Resources, 9800 Goethe Road, Sacramento, CA 95826-9101.

Distribution. Distribution of the regulation is Army - A and Air Force - F.

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1. Purpose.

This technician personnel regulation establishes the guidelines regarding the Uniformed Services Employment and Reemployment Rights Act as it relates to California National Guard Technicians.

2. References.

- a. Title 5 USC, Chapter 1, Part 353.208 and Chapter 63
- b. Title 38 USC, Chapter 43
- c. Title 5, Code of Federal Regulations (CFR) Part 353 and 630
- d. Executive Order 13223

3. Introduction.

On 13 October 1994, President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The new law made many changes that affect technicians performing uniformed service. The implementation of USERRA made major improvements in the protection of civilian job rights and benefits.

4. Basic Entitlement.

a. Any Federal employee who performs duty with a uniformed service (including active duty, active duty for training, or inactive duty for training), **whether voluntary or involuntary**, is entitled to be restored to the position he or she left or would have attained had the technician not entered the uniformed service, provided the technician:

(1) Gave the agency advance notice of departure except where prevented by military circumstances.

(2) Was released from uniformed service under honorable conditions.

(3) Served no more than a **cumulative total of 5 years.**

(4) Applies for restoration within the appropriate time limits.

b. While on duty with the uniformed services, the agency carries the technician on leave without pay (LWOP) unless the technician requests separation. **A separation under these circumstances does not affect restoration rights.** Uniformed service as defined in 38 United States Code (U.S.C.) 4303(16) defines Armed Forces as the Army and Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty and any other category of persons designated by the President in time of war or emergency.

5. Exceptions to 5 Year Limit.

The following service does not count toward the 5 year limit for reemployment:

a. 32 USC 502(a). National Guard regularly scheduled inactive duty training and annual training, or fulfill additional training requirements determined and certified in writing by the Secretary concerned to be necessary for professional development, or for completion of skill training or retraining (War College, Air Command and Staff College, NCO Academy, Command and General Staff College, BNOC, and ANOC).

b. 32 USC 503. National Guard active duty for encampments, maneuvers, or other exercises for field or coastal defense.

c. 10 USC 10148. Ordered to active duty up to 45 days because of unsatisfactory participation.

d. 10 USC 1209. Involuntary active duty in wartime.

e. 10 USC 12302, 12304, 12305. Involuntary active duty for National emergency up to 24 months; involuntary active duty for operational mission up to 270 days; involuntary retention of critical persons on active duty during a period of crisis or other specific conditions.

f. 10 USC 12406. Air and Army National Guard called into Federal service in case of invasion, rebellion or inability to execute Federal law with active forces.

g. 10 USC Chapter 15. National Guard called into Federal service to suppress insurrection, domestic violence.

h. Any active duty in support of a war, national emergency, critical mission or requirement.

6. Time Limits for Reemployment.

a. Technicians who serve in the uniformed services:

(1) Less than 31 days must report back to work at the beginning of the next regularly scheduled work day following their completion of service and expiration of 8 hours after a time for safe transportation back to the employee's residence.

(2) More than 30 days but less than 181 days must apply for reemployment no later than 14 days after completion of service.

(3) More than 180 days have 90 days after completion of service to apply for restoration.

b. Technicians who fail to meet these time limits are subject to disciplinary action. Agencies must reemploy as soon as practicable, but no later than 30 days after receiving the request to restore. Agencies have the right to ask for documentation showing the length and character of the technician's service and the timeliness of the application.

7. Loss of Reemployment Rights.

a. If a technician exceeds the 5-year cumulative limit, they will be terminated from National Guard employment.

b. Title 38, Section 4314(d) allows The Adjutant General of each state to refuse to reemploy a technician if reemployment is impossible or unreasonable, such as:

(1) The loss of military membership or inability to obtain military membership.

(2) Expiration of indefinite or temporary appointment during period of military duty.

c. Technicians with reemployment rights who fail to meet the military requirements of continued employment such as compatibility, inability to obtain the required security clearance, weight exceeds the allowable weight standards and physical standards will be reemployed and then separated in accordance with TPR 752.

8. Reemployment Position.

a. The position to which a technician returns after restoration under USERRA depends on the length of that service. If the period was less than 90 days, the technician must be placed in the position for which he or she qualifies and would have attained if not for the interruption by military service. After military service of more than 90 days, the technician will be placed in the above type of position **or** one of like seniority. If two or more technicians are entitled to restoration in the same position, the one who left the position first has the prior right to restoration. The other technicians would be placed according to the order of priority described above.

b. A technician is eligible to apply for vacant positions that become available while performing military duty. If a technician wishes to be considered for announced vacancies, he or she must submit an application and list in writing the types of positions for which he or she would like to be considered. The application and list should be sent to the Human Resources Office, ATTN: Personnel Staffing.

c. Technicians are not subject to a reduction in force while they are serving in the uniformed services. If they served for more than 180 days, they may not be separated, except for cause, for 1 year after their return. If they served for more than 30 but less than 181 days, they may not be separated, except for cause, for 6 months.

(Reduction in force is not considered "for cause" under OPM's regulations.) **The law expressly prohibits any kind of discrimination or act of reprisal against an applicant or technician because of his or her application, membership or service in the uniformed services.**

9. Service Credit.

Upon restoration, technicians are generally treated as though they had never left. This means that time spent in the uniformed services counts for seniority, within-grade increases, completion of probation, career tenure, retirement, and leave rate accrual. (Technicians do not earn sick or annual leave while off the rolls or in a non-pay status.)

10. Retirement.

a. A technician placed in LWOP status while performing military duty continues to be covered by the retirement law. Death and disability benefits continue whether covered under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS). **Technicians who separate are not covered under their retirement system in case of death or disability.**

b. To receive civil service retirement credit for military service, a deposit to the retirement fund is required to cover the period of military service. Only active, honorable military service is creditable for retirement purposes.

c. Title 10 military service is creditable for CSRS and FERS retirement, but a deposit for post-1956 may be required under CSRS to receive credit for eligibility and computation of retirement benefits. Post 1956 military service is never creditable for FERS retirement purposes unless a deposit is made.

d. Title 32 Active Duty National Guard service is creditable under CSRS and FERS when a deposit is made and only when the service meets **all** of the following conditions:

(1) It must interrupt civilian service creditable under CSRS or FERS.

(2) It must be followed by reemployment in accordance with Title 38 USC Chapter 43 that occurs on or after August 1, 1990.

- (3) It must be full time and not inactive duty.
- (4) It must be under Title 32 USC Sections 316, 502, 503, 504, or 505.
- (5) It must be performed by a member of the Army or Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia.
- (6) Individual must be entitled to pay from the U.S. (or have waived pay from the U.S.) for the service.

e. Upon restoration the deposit for military service may be made. The deposit payable under USERRA may not exceed the amount that would have been deducted and withheld during the civilian service that would have been performed during that time. Therefore under both CSRS and FERS, in computing the military deposit for service under USERRA, the agency must make two calculations:

- (1) 3% (for FERS) or 7% (for CSRS) of the military basic pay.
- (2) The calculation of what the CSRS or FERS employee contributions would have been for the civilian service, had the individual not entered into the military.
- (3) The technician pays the lesser amount. If the military deposit is paid within 3 years of restoration, no interest is charged. After 3 years interest starts accumulation. **The military deposit must be paid in full before retirement to receive credit.**

11. Annual Leave/Sick Leave.

- a. Technicians who enter active military duty, whether it is LWOP-US or Separation-US, may choose to:
 - (1) Use accrued and accumulated annual leave prior to and during LWOP-US; and prior to, but not during Separation-US. Technicians electing Separation-US will receive lump-sum payment for any unused annual leave.
 - (2) Have their annual leave remain to their credit until they return to their technician position from LWOP-US, but not Separation-US.
 - (3) Receive a lump-sum payment for all accrued and accumulated annual leave.
 - (4) Lump-sum payment will automatically be paid for any restored leave.
- b. When a technician returns to his or her technician position prior to the end of the period covered by the lump-sum payment, he or she must refund an amount equal to the pay that covers the period between the date of reemployment and the expiration of the lump-sum leave period. Restored leave will not be reaccruited.
- c. Sick leave can be used while on military duty (LWOP-US) IAW the statutory and regulatory criteria for using sick leave. Otherwise, sick leave will be reaccruited to the technician upon return to technician position.

12. Paid Military Leave.

- a. Each fiscal year, technicians under permanent appointment are entitled to 120 hours of military leave, with pay, to perform active duty. An employee on LWOP-US may be granted their 120 hours military leave without returning to duty as a technician. Technicians may carry over 120 hours of unused military leave into a new fiscal year. Therefore, potentially they may have a total of 240 hours to use in any one fiscal year.
- b. An additional 22 days of military leave (Law Enforcement Leave) may be granted under 5 U.S.C. 6323(b) if such leave is granted for the purpose of providing military aid to assist domestic civilian authorities to enforce the law or protect life and property.
- c. An additional 44 days of military leave (as explained in Technician Personnel Regulation 630) is also available for certain duty overseas, however it cannot be used when on military duty on call of the President.

13. Life Insurance.

- a. Federal Employees Group Life Insurance (FEGLI) of a technician who separates or takes leave without pay to enter the uniformed services continues for up to 12 months. There is no cost to the technician for this extension of coverage.
- b. When a technician is reinstated after military duty, he or she gets back whatever types of life insurance he or she had before going into non-pay status.

14. Health Insurance.

- a. Technicians who enter the uniformed services may elect to have their *Federal Employees Health Benefits* (FEHB) coverage continue for up to 12 months, and the technician continues to pay his or her share of the premium. Technicians who remain in the uniformed services beyond 12 months may continue their health insurance for an additional 12 months by paying 102 percent of the premium, i.e., the technician's share, the Government's share, and a 2 percent administrative fee. (This applies if the technician elects LWOP-US or Separation-US.) If the

technician elects to continue health benefits while on military duty, he or she may pay the premiums on a current basis or incur a debt to the Government and repay it when they return to active Federal service.

b. Technicians called to active duty in support of designated contingency operations (Bosnia, Iraqi Crisis, Kosovo, Enduring Freedom, Noble Eagle) are eligible for their FEHB premiums to be paid by the agency (both the employee and government contributions) for a period not to exceed 24 months. In order to be eligible for payment of the technician's share of the FEHB premium, the technician must:

- (1) Be enrolled in FEHB and elect to continue that enrollment.
- (2) Be called or ordered to active duty (voluntarily or involuntarily) in support of contingency operation as defined in section 101(a)(13) of Title 10, United States Code.
- (3) Be placed on leave without pay (LWOP-US) or separated (SEP-US) to perform active duty.
- (4) Serve on active duty for a period of more than 30 consecutive days.

15. Thrift Savings Plan (TSP).

a. Technicians who perform uniformed service may make up any contributions to the Thrift Savings Plan they missed because of such service. The amount of these contributions will be determined by using the TSP Election Form (TSP-1) that is in effect immediately before entry into military service. All make up technician contributions deducted from pay in a current calendar year are subject to the IRS annual limit in effect for the year to which the make up contributions are attributable. The technician can stop makeup contributions; however, the decision to stop is irrevocable. If covered by FERS, retroactive agency matching contributions are received as he/she makes up the technician contributions. The technician will receive retroactive agency automatic 1 percent contributions for the entire period missed as a result of military service whether or not the technician makes up the employee contributions. If while on military duty a technician contributes to TSP, contributions from military basic pay will offset the amount of contribution that can be made up. To make up missed contributions or other TSP actions taken due to military service, technicians must request it in writing within 60 days of the date of reemployment. The request should be sent to The Human Resources Office, ATTN: Employee Services, 9800 Goethe Road, P.O. Box 269101, Sacramento, CA 95826-9101.

b. If the automatic 1% contributions were removed because the technician was not vested (3 years of Federal employment), he or she is entitled to get them back. The technician should notify The Human Resources Office if the 1% contributions were forfeited.

c. If a technician is placed in non-pay status to perform military service and has a TSP loan, he or she must notify The Human Resource Office. Payments will be suspended for the period of military service (if a technician is placed in a non-pay status for any other reason other than military service payments may be suspended only up to one year). However, interest will continue to accrue during the period of military service. The time period for repaying the loan is extended by the period of military service. Technicians who had loans that were closed as taxable distributions because they separated to perform military service may be eligible to have the taxable distributions reversed after they return to duty. Retroactive earnings are not paid on this amount.

d. Technicians who received automatic cashouts of their TSP accounts because they separated to perform military service may return to TSP the full amount of the payment and have the taxable distribution reversed.

16. Request for Personnel Action (SF-52).

Prior to entrance on and upon return from active duty military service, the technician must submit a Request for Personnel Action, SF-52, along with a copy of applicable military orders and the USERRA Technician Checklist.

17. Use of Five Day Excused Absence.

a. In November 2003, the President directed agencies to grant Federal employees returning from Title 10 military duty in connection with Operation Iraqi Freedom, Operation Enduring Freedom, Operation Noble Eagle, or any military operation subsequently established under Executive Order 13223, five days of excused absence. **The five days of excused absence is available for each time a technician returns to duty (RTD) from such military service.**

b. Upon receiving notification from a technician of his or her intent to return to technician duty on a specific date, the agency must grant the technician five days of excused absence immediately prior to the actual resumption of technician duties. The commencement of the five days of excused absence represents a RTD and the technician is obligated to work at the end of the five day period. This absence may not be "saved" for use at a later date and must be used consecutively. A RTD action must be processed by the Directorate for Human Resources to use the five day excused absence.

c. A technician that is activated for Title 10 military service in connection with Operation Iraqi Freedom, Operation Enduring Freedom, Operation Noble Eagle, or in connection with Executive Order 13223 but was not deployed overseas is also entitled to the one-time five day excused absence.

d. All periods of time must be appropriately documented on the Time and Attendance Report. The proper code for an excused absence for Time and Attendance purposes is LV.

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